Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Petition for Declaratory Ruling of The Fax Ban Coalition	)	DA 05-2975

REPLY COMMENTS OF THE FAX BAN COALITION

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February 2, 2006

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INTRODUCTION AND SUMMARY

The Fax Ban Coalition,[1] a diverse group of nearly eighty American businesses and trade organizations, filed a Petition for Declaratory Ruling requesting that the Commission affirm that the Federal Communications Act ("FCA") grants it exclusive jurisdiction to regulate interstate communications and, accordingly, preempts State laws that regulate interstate fax communications. The responses to the Coalition's Petition were overwhelmingly supportive. In these Reply Comments, the Coalition addresses the comments of those who oppose the Petition. In short, those parties have submitted no argument that answers the Petition's assertion that Congress granted to the FCC and not the States authority to regulate interstate communications.

State laws that regulate interstate fax communications are preempted both because States lack authority in the first instance to regulate interstate communications, and because such regulation directly conflicts with the purposes and objectives of Congress as expressed in Section 227

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[1] A list of the Fax Ban Coalition members who joined the Petition is an attachment to the Coalition's Petition for Declaratory Ruling. *See* Fax Ban Coalition, Petition for Decl. Ruling, *Rules & Regs. Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Nov. 7, 2005) ("Petition").

of the FCA. As the Commission said in 2003, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules. . . . [S]tate regulation of interstate telemarketing calls that differs from [the federal] rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."[2]

Despite contrary suggestions from certain commenters, the Commission need not apply any purported "presumptions" in order to make preemption decisions, nor would preemption interfere with the States' plenary police power. As the courts have long recognized, the Commission has full authority to preempt State laws that interfere with the exercise of its jurisdiction over interstate communications. Because Congress granted the FCC, and not the States, authority to regulate in this area, the Commission must declare that all such laws regulating interstate faxes are preempted.

I. THE FCA STATE LAWS REGULATING INTERSTATE FAX COMMUNICATIONS

A. States Lack Jurisdiction To Regulate Interstate Communications

Some of the commenters assert that "there is not complete preemption by the FCA"[3] and that the Commission lacks "exclusive authority over interstate telemarketing."[4] That, however, is not what the Coalition contends. The Coalition asserts that States lack jurisdiction to regulate

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2 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14,014, 14,065 ¶¶ 82-84 (2003) ("2003 Report and Order").

3 *See* State Attorneys General ("SAG") Comments at 8-9; *id.* at 9 & n.3 (citing *Wisconsin v. AT&T Corp.*, 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002)). A list of the comments cited in the Fax Ban Coalition's Reply Comments is attached as Appendix B.

4 *See* EPIC Comments at 5.

interstate communications, and that State laws that regulate interstate fax communications are therefore preempted.

In response, the State Attorneys General cite the Supreme Court's observation in *Louisiana Public Service Commission v. FCC* that, "in practice, the realities of technology and economics belie such a clean parceling of responsibility" between the Commission and the States, with the Commission having plenary authority over interstate communications, and the States having exclusive jurisdiction over intrastate communications.[5]

The Coalition, however, does not claim that the States have exclusive jurisdiction over intrastate communications. The FCA gives the States exclusive jurisdiction over intrastate communications *except* "as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter."[6] Section 227, of course, is the TCPA.

It was precisely because the FCA gives the Commission jurisdiction to regulate intrastate communications under Section 227 that Congress neededto make explicit, in Section 227(e)(1), the limits of the Commission's authority under Section 227 with respect to such communications. But because the FCA gives the States no jurisdiction to regulate interstate communications,[7] Congress did not need to provide in Section 227 that States may *not* regulate interstate communications.

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5 SAG Comments at 8 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986)).

6 47 U.S.C. § 152(b).

7 *See id.* §§ 152(a), 201.

The State Attorneys General point to three provisions of the FCA, and an uncodified provision of the Telecommunications Act of 1996, that they claim "manifest a longstanding congressional intention to preserve State regulation of the telecommunications industry, and to limit preemption."[8] Reliance on these provisions is misplaced, however, because they do not grant or recognize State jurisdiction to regulate *interstate* communications for any purpose.

Section 253(b). Section 253 "preempts state laws that have the effect of prohibiting competitors' ability to enter the telecommunications market."[9] This preemption is "virtually absolute" and "narrowly circumscribe[s] the role of state and local governments in this arena."[10] Section 253(b) is a "narrow exception" to a "broad prohibition."[11] It does not even come into play unless it has been determined that a State or locality has imposed an "entry barrier" that is otherwise preempted by Section 253. This provision is clearly aimed at entry into the intrastate communications market, and it cannot be the foundation for authority over interstate communications.

Section 332(c)(3)(A). Section 332(c)(3)(A) limits a restriction on State jurisdiction over intrastate communications. Subject to exceptions, Sections 152(b) and 221(b) preserve to the States exclusive jurisdiction over intrastate telephone services. Section 332(3)(A) prohibits

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8 SAG Comments at 18-19.

9 *US West Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 954 (9th Cir. 2002). *Accord Cavalier Telephone, LLC v. Verizon Virginia, Inc.,* 330 F.3d 176, 186 (4th Cir. 2003) (The FCA "granted the FCC authority…to preempt the laws of any state that prohibited competition in local telecommunications markets, bringing under federal control much of the transition from regulated local monopolies to free market industry.").

10 *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001).

11 *Id.* at 1170

States and localities from exercising that jurisdiction to regulate the entry of, or the rates charged by, commercial or private commercial mobile radio service providers. The subparagraph simply provides that this general prohibition does not preempt State regulation of "other terms and conditions" of intrastate mobile-phone service.

Section 414. Section 414 provides: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." This provision is completely inapposite. Section 414 is well understood as preserving "causes of action for breaches of duties distinguishable from those created under [the Act], as in the case of a contract claim."[12] It cannot form any basis for States to assert jurisdiction over interstate communications that they otherwise lack under the FCA.

Section 601(c). Section 601(c)(1) of the Telecommunications Act of 1996, entitled "NO IMPLIED EFFECT," provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Again, this provision simply defines the extent to which the 1996 Act may be deemed to have changed pre-existing Federal, State, and local law. It provides no basis for the claim of jurisdiction the States assert. (In quoting the provision, Defendants excise its reference to "Federal" law.)[13]

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12 *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 707 (1st Cir. 1977).

13 SAG Comments at 19.

The three cases cited by the State Attorneys General – *Pinney v. Nokia*,[14] *Smith v. GTE Corp.*,[15] and *Minnesota v. Worldcom, Inc.*[16] – are equally far afield. These cases are about federal removal jurisdiction, not preemption. In each case, (1) the plaintiffs brought an action in State court asserting a State-law claim; (2) the defendant sought to remove the action to federal court under the doctrine of "complete preemption"[17]; and (3) the court held that the action could not be removed under that doctrine because preemption was only a defense to the plaintiffs' claim.

More importantly, none of these cases involved a State's attempt to regulate telecommunications. In *Pinney*, the plaintiffs asserted product-liability claims against a manufacturer of wireless telephones. In *Smith*, the plaintiffs sought to enjoin a telecommunications provider from misrepresenting its telephone lease charges. And in *Worldcom*, the plaintiffs asserted that the carrier's television advertising campaign was false and deceptive. Product-liability claims obviously are not at issue here; and the *Smith* and *Worldcom* plaintiffs were attempting to regulate the *advertising* of interstate communications, not attempting to regulate interstate or intrastate communications.

Head v. N.M. Bd. of Examiners in Optometry,[18] cited by the Attorney General of Tennessee, is also unavailing. This case also involved State authority to regulate the advertising mes-

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14 402 F.3d 430 (4th Cir. 2005).

15 236 F.3d 1292 (11th Cir. 2001).

16 125 F. Supp. 2d 365 (D. Minn. 2000).

17 *See In re Miles*, 430 F.3d 1083, 1087-90 (9th Cir. 2005) (explaining doctrine).

18 374 U.S. 424 (1963).

sage and not, as here, State authority to prescribe conditions for the *transmission* of advertising content. The preemption claim, moreover, was not that the State lacked jurisdiction to regulate interstate communications, but that the Commission's power to grant, renew, and revoke broadcast licenses divested the States of their power to regulate professional advertising practices. The Court's rejection of that preemption claim has no bearing on the preemption issue here.[19]

B. Section 227(e)(1) Requires Preemption.

Several commenters argue that the State laws at issue are an exercise of State authority recognized and permitted by Section 227(e)(1).[20] In pertinent part, Section 227(e)(1) provides:

> [N]othing in this section or in the regulations prescribed under this section shall preempt any State law [1] that imposes more restrictive intrastate requirements or regulations on, or [2] which prohibits–
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> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitations.

These commenters rely on clause 2 to support the application of State law to interstate fax communications. But clause 2 does not "permit" States to do anything. It simply disclaims preemption "under this section," *i.e.*, Section 227. As a threshold matter, however, States lack

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[19] *Id.* at 431-32. *See also Nat'l Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969) (the differential treatment accorded to communications common carriers and radio broadcasters in this chapter reflects congress' belief that commercial broadcasting in not a natural monopoly which creates the same kinds of risk that a telephone system does).

[20] SAG Comments at 14-15; EPIC Comments at 6; McKenna Comments at 3; Tennessee Attorney General Comments at 2-3.

jurisdiction to regulate interstate communications. As the Coalition has explained, Congress enacted Section 227 to regulate such communications *because* States lack such jurisdiction.[21] In disclaiming preemptive intent as to intrastate communications, Section 227(e)(1) does not confer jurisdiction to regulate interstate communications that the States otherwise lack.[22]

The State Attorneys General argue that Congress's inclusion of the "intrastate" qualifier in clause 1, and its omission of that qualifier in clause 2, means that clause 2 allows states to *prohibit* interstate communications that clause 1 does not allow them to *regulate*.[23] This construction stretches the logic of Congressional action too far. These commenters do not even attempt to explain why Congress would have intended such a perverse result, or why Congress would have used a "bank shot" to confer on the States a jurisdiction at such variance with the statutory regime as a whole. The strained inference that the State Attorneys General draw from the omission of an "intrastate" qualifier in clause 2 – that states may exercise jurisdiction over interstate fax advertising – violates the "fundamental canon of statutory construction that the words of a

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21 *See* Petition at 9.

22 The State Attorneys General quote *Cellulcar Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999), as though the court was describing Section 227(e)(1). SAG Comments at 14. The court, however, was describing a different provision. The State Attorneys General also cite *Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns, L.P.,* 329 F. Supp. 2d 789 (M.D. La. 2004), as though it was significant that the State law contained an EBR exception, while the TCPA (at the time) did not. SAG Comments at 20. That difference had no significance in the case: The court mentioned the EBR exception only once, in discussing the plaintiffs' claim that the TCPA was unconstitutionally vague. 329 F. Supp. 2d at 808.

23 SAG Comments at 14-15; Tennessee Attorney General Comments at 2-3.

statute must be read in their context and with a view to their place in the overall statutory scheme."[24]

Two other commenters take the opposite tack, seeking to bolster their overly broad reading of clause 2 by treating the "intrastate" qualifier in clause 1 as meaningless and either erroneously summarizing Section 227(e)(1) as barring the Commission from preempting "more restrictive state laws on telemarketing abuses,"[25] or suggesting that Congress has not indicated its intent to preempt State fax laws that have interstate reach.[26] But Congress *did* limit more restrictive State laws to intrastate faxes, and Congress had no need to express an intent to preempt the States from enacting laws that the FCA has already placed beyond their jurisdiction.

Drafting considerations probably explain the difference in phrasing in clauses 1 and 2. To have been made technically parallel to clause 1, clause 2 would have had to read "or which prohibits, with respect to intrastate communications . . . ." Including such a phrase in clause 2 might have made it more precise, but doing so would have repeated a qualifier already used in clause 1. In this instance, Congress traded precision for conciseness, leaving the "intrastate" qualification implicit rather than making it express. This explanation honors the "whole statute" canon of statutory construction as well as the canon *reddendo singula singulis*, by which a court "interpret[s] a passage in which antecedents and consequents are unclear by reference to the con-

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24 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

25 McKenna Comments at 3 (asserting that Section 227(e) "expressly provides. . . that states have the right to fashion more restrictive state laws on telemarketing abuses, or state laws prohibiting unsolicited fax ads. One would think this would leave the Commission powerless to preempt such laws.").

26 EPIC Comments at 6.

text and purpose of the statute as a whole."[27] By that canon, "words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction."[28]

C. State Regulation of Interstate Fax Communications Conflicts With The TCPA

The State Attorneys General argue that a State law such as Section 17538.43 of the California Business and Professions Clause does not conflict with Section 227 (as amended by the Junk Fax Prevention Act of 2005 ("JFPA")) on the ground that Section 227 bars States from requiring *written* express prior consent but not *oral* express prior consent, so that a State law like Section 17538.43, which does not specifically require written express prior consent, does not necessarily conflict with Section 227.[29]

The State Attorneys General claim that Congress, in enacting the JFPA, sought only to avoid the requirement of written express prior consent that the Commission adopted by rule in

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[27] *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1412 (9th Cir. 1989) (citations omitted). *Accord Bailey v. U.S.*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

[28] *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918). *Cf. Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129 (D.C. Cir. 1999) ("Courts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme. Where such a conflict exists, it is appropriate to consider the purpose of the disputed provision and to construe the text accordingly."); *United States v. Koyomejian*, 946 F.2d 1450, 1459 (9th Cir. 1992) ("That Congress did not state its intent in the most precise or elegant terms is no reason to deny effect to that intent.").

[29] SAG Comments at 21 n.7.

2003 (and which never went into effect).[30] That is incorrect. Congress sought to codify the established business relationship exception that the Commission had adopted by rule in 1992. That rule waived the requirement of express prior consent in *any* form.[31] The fact that the legislative history of the JFPA mentions only burdens imposed by requiring written express prior consent does not signify that Congress was concerned only with those burdens.[32]

What is dispositive is the statutory language itself. As amended by the JFPA, Section 227 specifically rejects any distinction between written and oral consent, defining "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, *in writing or otherwise*."[33] The statute allows "unsolicited" fax advertisements if "the unsolicited advertisement is from a sender with an established business relationship with the recipient"[34] because, in that event, the advertisement is not deemed to be "unsolicited." The unmistakable purpose of the statutory text is to lift, in the context of an established business relationship, any requirement of the recipient's "prior express invitation or permission, *in writing or otherwise*." If Congress had meant to bar only requirements of written express prior consent, it would not have used such all-encompassing language.

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30 *Id.*

31 *See* Section 227(a)(2) (codifying definition of established business relationship in 1992 rule).

32 *See* SAG Comments at 21 n.7.

33 Section 227(a)(5) (emphasis added).

34 Section 227(b)(1)(C)(i).

EPIC argues that "[n]othing about the junk fax regulations established in California and other states impedes the rapidity of signals or their efficiency."[35] That is obviously incorrect. The California statute and similar state laws prohibit "signals" from being sent at all unless the sender complies with the express prior consent requirement.

Van Bergen v. Minnesota,[36] cited by some commenters,[37] does not hold that State regulation of interstate communications does not conflict with federal regulation of such communications. The Eighth Circuit in that case rejected a gubernatorial candidate's claim that the TCPA preempted a State law that limited his ability to make automated calls to the State's voters. No State regulation of interstate communications was at issue.[38]

The State Attorneys General argue that there is no conflict between the California statute and Section 227 because both share the same consumer-protection goals, and it is physically possible to comply with each without violating the other.[39] Whether that is true or not matters not: the State law conflicts with the purposes and objectives of Congress. The fact that a State and Congress may share some goals does not free the State to thwart other goals of Congress. The conflict here arises from the fact that Congress enacted Section 227 to relieve those who send interstate fax advertisements from the requirement of prior express consent. The fact that California and other States have enacted laws regulating fax communications to codify Section 227

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35 EPIC Comments at 6.

36 59 F.3d 1541 (8th Cir. 1995).

37 *See* EPIC Comments at 9; SAG Comments at 20.

38 *See* 59 F.3d. at 1548.

39 SAG Comments at 21 n.7.

as it existed before the JFPA amended it further confirms the conflict.[40] As the Commission said in 2003, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules. . . . [S]tate regulation of interstate telemarketing calls that differs from [the federal] rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."[41]

The Tennessee Regulatory Authority ("TRA") asserts that the Tennessee statute has effectively addressed abusive and deceptive fax marketing practices.[42] Assuming this is so, that does not mean that the State law is a valid exercise of the State's jurisdiction or that the State law is in harmony with federal law. Section 227 recognizes that States may sue in State court "on the basis of an alleged violation of any general civil or criminal statute of such State,"[43] but Section 227 does not permit States to impose conditions on the transmission or interstate communications *as such*. And apart from the fact that States lack jurisdiction to do so, State-by-state regulation of interstate communications is a prescription for regulatory paralysis, not consumer protection.[44]

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40 *See* Petition at 18. *See also*, *e.g.*, Joint Comments of the Direct Marketing Ass'n, Am. Ass'n of Advertising Agencies, Ass'n of National Advertisers, Inc., & Magazine Publishers of America ("Joint Association Commenters"), at 2 (observing that "state efforts to eliminate [the JFPA's] EBR exception even *after* enactment of the JFPA are most striking").

41 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14,014, 14,065 ¶¶ 82-84 (2003) ("2003 Report and Order").

42 TRA Comments at 3-5.

43 Section 227(f)(6).

44 Many commenters have discussed the burdens they would face from state-by-state regulation of their interstate communications. *See*, *e.g.*, American Business Media Comments at 3-4;

(footnote cont'd . . .)

D. A "Presumption Against Preemption" Does Not Apply.

EPIC argues that the Commission must apply a "presumption against preemption."[45] That argument, however, is severely undercut by *Ting v. AT&T*.[46] In *Ting*, the Ninth Circuit declined to apply the presumption in deciding whether the Communications Act preempted residential customers' claims against long-distance telecommunications carrier under California's Consumer Legal Remedies Act and law of unconscionability. The court stated:

> Ordinarily, we . . . apply a presumption against preemption. However, "when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), the presumption usually does not apply, *id.*; *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir.2002). Thus, we do not apply the presumption against preemption in this case because of the long history of federal presence in regulating long-distance telecommunications.[47]

The stale cases on which EPIC relies are inapposite because they involved a "field which States have traditionally occupied" or held that federal law preempted state law.[48] In arguing

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American Society of Travel Agents Comments at 4-7; Consumer Mortgage Coalition Comments at 1-3; Consumer Bankers Asssociation Comments at 3 (discussing the particularly egregious nature of California's statute and the burdens on out-of-state senders it imposes).

45 EPIC Comments at 10-13.

46 319 F.3d 1126 (9th Cir. 2003).

47 *Id.* at 1136. *See also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (no mention of presumption in FCC preemption case); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (same).

48 *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 220 (1947). *See* EPIC Comments at 10-13 (citing *Mo. Pac. Ry. Co. v. Larabee Flour Mills Corp.*, 211 U.S. 612 (1908) (regulation of train cars that had not entered interstate commerce); *S. Ry. Co. v. Reid*, 222 U.S. 424 (1911) (preempting state attempt to regulate interstate commerce); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (finding federal preemption of state law regulating food labeling); *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989) (relating to state antitrust laws that did not interfere with federal scheme)).

that State laws regulating interstate faxes are entitled to a presumption against preemption because such State laws exercise the States' police power,[49] EPIC confuses *what* the State is regulating with *why* the State is regulating. The State laws at issue here regulate interstate communications. The fact that they may do so for consumer protection purposes is immaterial.[50] The State Attorneys General argument that the presumption against preemption applies because such State laws regulate advertising[51] fails for the same reason.[52]

The State Attorneys General cite three other cases as affirming the strength of the State interests that Section 17538.43 purportedly serves.[53] None involved a State's attempt to regulate *interstate* communications. *New Orleans Public Service, Inc., v. City of New Orleans*[54] considered whether a State's interest in regulating *intrastate* utility rates warranted *Younger* abstention under the circumstances of the case. *Communications Telesystems International v. California*

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49 EPIC Comments at 2; *see also* SAG Comments at 10, 12-14 (claiming that the California law at issue "is, at its core, a consumer protection statute" that has "long been within the province of the States' police powers").

50 *See Ting*, 319 F.3d at 1136 (declining to apply the presumption in considering whether the FCA preempted claims asserted under State consumer protection law); *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 555-56 (9th Cir. 2002) (same) (Federal Bank Act); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1008 (E.D. Cal. 2002) (same) (regulating credit card transactions).

51 SAG Comments at 10.

52 *See Skysign Int'l, Inc. v. City & County of Honolulu,* 276 F.3d 1109, 1115-16 (9th Cir.2002) (declining to apply presumption to claim that Federal Aviation Act preempted city and county's regulation of aerial advertising).

53 SAG Comments at 13-14.

54 491 U.S. 350 (1989).

PUC[55] evaluated whether the FCA prevented California from suspending the operations of a provider of *intrastate* long-distance services as a sanction for "slamming." And *California v. FCC*[56] determined whether the "impossibility exception" to Section 2(b)(1),[57] which denies the FCC jurisdiction over *intrastate* communications, applied in the circumstances of the case.

II. THE COMMISSION HAS AUTHORITY TO PREEMPT STATE LAWS REGULATING INTERSTATE FAX COMMUNICATIONS.

A. The FCC May Preempt State Law.

For the reasons already discussed, the States lack jurisdiction under the FCA to regulate interstate fax communications. Any other conclusion by the Commission in this proceeding would be contrary to law. But even if the FCA itself did not deny States jurisdiction to regulate interstate fax communications, the Commission itself could – and should – preempt such State regulation. As the Supreme Court has stated:

> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[58]

The State Attorneys General assert that *Louisiana Public Service* does not apply here because that case gives the Commission power to preempt State regulations relating to communica-

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55 196 F.3d 1011 (9th Cir. 1999).

56 905 F.2d 1217, 1242 (9th Cir. 1990).

57 47 U.S.C. § 151(b),

58 *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

tions services, not to the *use* of those services.[59] This is a distinction without a difference. To regulate the use of communications services is to regulate those services.[60] The State Attorneys General also claim that the State laws at issue are in an area not "committed to the agency's care by the statute."[61] That claim is refuted by Section 227 itself, which covers the same territory as those State laws. Finally, the State Attorneys General claim that Section 227 regulates the content of communications, not the transmission of communications.[62] That claim is also incorrect. Section 227 regulates transmission, and other provisions of the FCA regulate content.[63] The State laws at issue here, moreover, regulate the transmission of communications, not their content.

B. Preemption Would Not Interfere With The States' Police Powers.

Some commenters claim that preemption of State fax laws is inappropriate because preemption would interfere with States' exercise of their police powers.[64] As discussed above in the Coalition's discussion of a "presumption against preemption," this claim is untrue. Section 227 recognizes that a State may sue in State court "on the basis of an alleged violation of any general

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59 SAG Comments at 9.

60 *Id.*

61 *Id.* at 7-8.

62 *Id.* at 9; EPIC Comments at 5.

63 *See, e.g.,* 47 U.S.C. § 223 (prohibiting obscene or harassing telephone calls).

64 SAG Comments at 6 n.2; EPIC Comments at 2; TRA Comments at 3.

civil or criminal statute of such State."[65] Preempting State laws such as California's would not deprive States of authority to proceed against those who violate such statutes using fax communications, including statutes prohibiting harassment or fraud or statutes regulating commercial transactions.

C. Courts Will Defer to FCC's Preemption Decision.

EPIC recognizes that, if the FCA itself is not held to preempt State laws such as California's, courts would defer to the Commission's judgment that such State laws should be preempted.[66] For the reasons given, the Commission should declare, pursuant to its own authority to preempt, that such State laws are preempted.

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65 47 U.S.C. § 227(f)(6). *See generally*, *In re Long Distance Telecomms. Litig.*, 831 F.2d 627 (6th Cir. 1987) (State law claims for fraud and deceit against long distance telephone companies based on their failure to notify customers of the practice of charging for uncompleted calls were not preempted by the FCA); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107 (D. Kan. 1983) (claims that unconscionable methods were employed to compel subscribers to long distance telecommunications services to sign service providers' contract forms, containing arbitration clauses are not preempted by the FCA); *Wisconsin v. AT&T Corp.*, 217 F. Supp. 2d 935 (W.D. Wis. 2002) (State's action against telecommunications provider, alleging that its consumer telecommunications contracts concerning long distance service violated State's consumer protection laws, was not completely preempted by Federal Communications Act, in absence of Act's requirement that telecommunications providers file tariffs concerning specified rates, terms and conditions for long distance telephone service).

66 EPIC Comments at 11 (citing *Chevron v. NRDC*, 467 U.S. 837 (1984)).

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

FAX BAN COALITION

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APPENDIX A
LIST OF COMMENTERS AND ABBREVIATIONS

The Reply Comments of the Fax Ban Coalition refer to comments filed by the following parties:

	American Business Media
	American Society of Travel Agents, Inc.
SAG	Attorneys General of Arkansas, Connecticut, Kentucky, and New Mexico (State Attorneys General)
CBA	Consumer Bankers Association
	Consumer Mortgage Coalition
	The Direct Marketing Association, Inc.
EPIC	Electronic Privacy Information Center
	Douglas M. McKenna
	Tennessee Attorney General
TRA	Tennessee Regulatory Authority